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Who Is to Control the Oceans: U.S. Policy and the 1973 Law of the Sea Conference †

The present crisis in the Law of the Sea is of vital importance not only to international lawyers and lawyers generally, but to all citizens of the United States. It affects the mobility of U.S. naval and air forces, particularly our nuclear submarines and our aircraft; the development of the most important available new sources of petroleum and hard minerals at a time when we are facing an energy crisis and nationalization of traditional sources of hard minerals; and the availability of animal protein from fish to feed the world's increasing population. This crisis is leading to escalating bilateral conflicts between countries because of the increasing importance of their disagreement over legal rights in the ocean.

This article will review U.S. policy in the light of preparations for the upcoming 1973 Law of the Sea Conference, emphasizing the unsettled issues.

I. Background

The present crisis and U.S. policy are best understood in a global and historic context: The law of the sea in essence comprises the rules governing the activities of men and nations on the 70% of this planet occupied by its oceans. Its fundamental premise, the freedom of the seas, goes back to the 17th Century (1609) when the Dutch scholar Hugo Grotius' concept of the Mare Liberum (free sea) prevailed over the English scholar John Selden's Mare Clausum (closed sea). It has been the cornerstone of the law of the sea for the last three and a half centuries.

Today this doctrine is under serious attack. A number of developing

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coastal States assert claims to 200 mile territorial seas. If 200 mile territorial seas were accepted world-wide, more than 30%—up to 50%, according to the Soviet geographers—of our oceans would cease to be high seas and would be subject to coastal State sovereignty. In this huge area foreign states would enjoy only the right of innocent passage: that is, without the consent of coastal States, there would be no right in this area to overfly or transit submerged; there would be no right to fish or conduct scientific research; and no right to engage in exploitation of petroleum and other mineral resources under an international régime.

It was in response to this challenge and to the fundamental problems which have produced it, that the United Nations General Assembly in December 1970 called for a conference on the Law of the Sea, to take place in 1973 with a view to reaching international agreement on the outstanding problems.

II. Development of the Freedom of the Seas Doctrine

The freedom of the seas doctrine provides in essence that all states have equal rights to use the high seas, subject to reasonable regard for each other's use of the seas, and prohibits the establishment of national sovereignty over the high seas. From its inception in the 17th Century the freedom of the seas doctrine was not applied right up to the shore. Principally because of the defense interest of the coastal state, a 3-mile territorial seas was generally recognized in which the coastal state was sovereign subject only to a right of innocent passage for foreign vessels.

The law of the sea remained relatively stable for three and one-half centuries up to World War II, and the record of respect for it by states was remarkable. In the twentieth century the dispute between proponents of a 3-mile territorial sea and the advocates of wider territorial sea limits up to 12 miles, frustrated the achievement of a general international treaty agreement on the precise breadth of the territorial sea; however, there was unanimous agreement prior to World War II that the oceans beyond 12 miles were high seas, and not subject to the territorial jurisdiction of any state.

III. 1958 and 1960 Law of the Sea Conferences

Following World War II, in a monumental effort to codify and develop the Law of the Sea, the United Nations International Law Commission prepared four draft conventions with respect to the legal régimes for the territorial sea, high seas and the continental shelf as well as fisheries

conservation. These formed the basis for the four conventions adopted at the 1958 Geneva Conference on the Law of the Sea. However, the Conference was unable to agree on a maximum breadth for the territorial sea, or for coastal state exclusive fisheries jurisdiction, and was also unable to agree on a precise seaward limit for coastal state sovereign rights over the mineral resources of the continental shelf.

Moreover, the Conference did not address the problem of a legal régime for the seabeds beyond national jurisdiction, and adopted only rudimentary rules with respect to the prevention of ocean pollution. At a further Conference in 1960 held for the purpose of agreeing on the breadth of the territorial sea, a United States-Canadian proposal for a 6-mile territorial sea and an additional six miles exclusive fishery zone, failed by one vote to achieve the necessary two-thirds majority.

Two parallel developments underlie the present crisis in the present law of the sea: (1) technological advances since World War II leading to new and more intensive uses of the oceans; and (2) the proliferation of unilateral claims to broad maritime jurisdiction by coastal states.

IV. Technological Breakthrough since World War II

Prior to World War II, navigation and fishing were the principal uses of the sea. Today we have a technical capacity to employ the oceans for an increasing variety of uses and with ever-increasing intensity.

We have developed the technology to recover petroleum from the oceans' seabeds at increasingly greater depths. There is probably as much petroleum potential under the oceans as on land, with offshore production already constituting 17% of the total U.S. production, and commercial production moving out to the 200 meter water depth and beyond.

Manganese nodules lying in large quantities on the deep ocean floor are rich in nickel, copper and cobalt. Exploratory mining of these nodules has already taken place, and the technological progress is such that commercial production of certain of these metals is expected by the end of the decade.

We have developed nuclear submarines and super tankers, and are developing submersible cargo carriers.

We are catching new stocks of fish and engaging in fish farming, while distant water fishing states are using highly mechanized fish factory ships and sophisticated sonar equipment in tracking fish.

We have developed new methods of scientific research in the oceans. Such research has acquired increasing importance not only with respect to the oceans and their resources, but with respect to a better knowledge of our planet, its wealth and its environment.

We now have the capability to destroy the oceans' capacity to sustain life by overfishing and pollution and to waste its mineral potential. We also have the capacity to degrade the marine environment far from where an ocean activity takes place.

As a result of all these developments, conflicts between different uses of the same ocean space are developing. For example, seabed drilling and mining may interfere with navigation and fishing, spills from tankers with recreation on beaches, and pollution control measures with maritime trade.

In the absence of widely agreed legal rules, increasing bi-lateral conflicts are occurring between states over various competing uses of the oceans.

V. Unilateral Claims by Coastal States—Partition of the Oceans

Coastal states do have a legitimate interest in exploiting fisheries and mineral resources off their coasts, and protecting their coastal waters and beaches from pollution, an interest which the United States shares as a coastal state. Thus it is understandable that, in the absence of international agreement on the breadth of the territorial sea and on fisheries and mineral resources jurisdiction, coastal states have been asserting wider and more far-reaching maritime jurisdiction out to 200 miles and beyond. Such action is no longer limited to Latin America.

Certain Latin American countries have supplied an ideological rationale for these unilateral claims, by asserting that every state has the right to fix its maritime jurisdiction within reasonable limits. This is, of course, an invitation to a partition of the oceans as was attempted by the maritime powers in the 17th Century.

Moreover, it has become increasingly difficult for other states to enforce high seas freedoms directly against coastal claims as they did in the past. Not only are there treaty restrictions on the use of force, but any such course of action must be weighed against the potential cost in terms of other foreign policy objectives.

Coastal state claims to wider maritime jurisdiction have escalated since the failure of the 1960 Conference to reach agreement on the breadth of the territorial sea and coastal state fisheries jurisdiction. The 1973 Law of the Sea Conference may well be the last opportunity to accommodate peacefully the various coastal, maritime and seabed interests which are presently in conflict.

VI. United States Policy

President Nixon, on March 23, 1970, announced a U.S. oceans policy

which was designed to accommodate a wide variety of interests. It was based on the premise that these interests are not necessarily in conflict if properly analyzed and may be accommodated rather than compromised in a general international solution.

The basic components of this policy are as follows:

(a) Territorial Sea and Straits

The United States has proposed a move from our present position of a three mile territorial sea to an agreed twelve mile territorial sea, provided freedom of transit through and over straits used for international navigation is guaranteed.

The reason why the United States is insisting on this guarantee of free transit through and over straits used for international navigation, is that with the move from a three to a twelve mile territorial sea, international straits between six and twenty-four miles wide would become overlapped by territorial seas, and in these straits foreign shipping would only have a right of innocent passage. The United States Navy and merchant marine are highly dependent upon unimpeded transit through many of these straits between six and twenty-four miles in width, and the right of innocent passage through these straits is no longer a satisfactory guarantee of free transit.

In the first place, under the 1958 Convention on the Territorial Sea there is no right for submerged transit by submarines, or for military overflight of territorial seas. Secondly, a number of coastal states have interpreted innocent passage in a subjective way, as permitting them to prevent passage of certain types of vessels, such as super-tankers or nuclear powered vessels or because of the nature of the cargo or destination of the vessel.

(b) Fisheries

The United States recognizes that to achieve a general international agreement on a twelve mile territorial sea, coastal states must be given fishing jurisdiction beyond twelve miles. Moreover, the United States' own coastal fishermen are interested in protection from highly mobile distant water fishing fleets beyond twelve miles from the coast. On the other hand, United States distant water fishermen, particularly the tuna fishing and shrimp industries, are interested in continuing to fish off the coast of other nations, particularly certain of our Latin American neighbors.

The United States has proposed giving coastal states regulatory jurisdiction and preferential economic rights, based on their capacity to catch, with

respect to the coastal species of fish adjacent to their coasts as well as anadromous species such as salmon which spawn in their rivers but swim far out into the oceans before returning to the rivers where they originate. These coastal and anadromous species constitute over three-quarters of the world's fishing catch.

This coastal state jurisdiction would extend as far off shore as the species ranges. The coastal states' preferential rights would be subject to a negotiated general agreement on distant water states' traditional fishing rights. Highly migratory fish, such as tuna, would be under international and regional rather than coastal state, control.

No single state can adequately manage a migratory species such as tuna which ranges through the waters of a great number of coastal states, as well as the high seas, far from any coastal state. On the other hand, in the case of salmon which spawn in a coastal state's rivers, the very existence of the species depends upon the coastal state's maintenance of a favorable environment in its rivers for these species and the return of a sufficient number from the high seas to a particular river in order to maintain the species. The yield of this species, and the restraints necessary to protect their fresh water spawning environment, can be maximized if they are subject to the management of the coastal state from which they come, and to which they will return, if not caught on the high seas.

(c) Seabed Resources

With respect to the exploitation of the seabed's mineral resources, the United States has proposed an intermediate zone approach—that is, an area of mixed coastal state and international jurisdiction between the area of coastal state sovereign rights and a fully international area beyond. Under the United States proposal, coastal state sovereign rights over the exploitation of the seabed's petroleum and sedentary fish, such as oysters, would extend to the edge of the twelve-mile territorial sea, or the 200-meter water depth line, whichever is further seaward. The intermediate zone would extend from this point to the seaward edge of the geological continental margin, in which most of the ocean's petroleum deposits are believed to be located.

The essential purpose of this proposal is to accommodate coastal state desires, for effective control over the petroleum in the submerged continental margin off their coast, but at the same time to protect other uses of the seabed and waters above, to assure minimum global standards of environmental protection, and to provide for some revenue-sharing with the international community.

In order to meet criticism of the United States' proposal by developing coastal states, particularly those with a narrow continental margin, the United States has indicated a willingness to consider a mileage outer boundary of the intermediate zone as well as an outer boundary based on alternative mileage, depth and geological criteria.

(d) Scientific Research

In our view, scientific research in the oceans is, and should be, beneficial to all. The United States supports both maximum freedom of scientific research, and maximum efforts to ensure dissemination of the results of such research. There is no inherent contradiction between the exercise of resource jurisdiction by coastal states and freedom of scientific research. On the contrary, such research can enhance the ability of coastal States to derive maximum benefits from resources under their jurisdiction.

(e) Environmental Protection

The United States is vigorously seeking to bring ocean pollution under effective international regulation in a number of different forums. IMCO has produced several Conventions on pollution from ships, and is continuing this work. Also significant are IMCO's attempts to lessen the chances of collisions at sea through such measures as traffic separation arrangements. The U.S. has worked for a Convention on ocean dumping, an environmental monitoring system, an international force for research, as well as other measures in the context of the 1972 Stockholm Conference on the Human Environment.

The U.S. draft seabed treaty proposes that the international seabed organization, to be established by the Law of the Sea Conference, be given broad regulatory and emergency powers in order to prevent pollution arising from exploration and exploitation, and from all deep drilling, in the international seabed area.

Also, one essential advantage of an intermediate zone on the seabeds is that minimum environmental standards can be fixed internationally, thus better assuring protection of the ocean environment as a whole, assuring coastal States that they will not suffer competitive economic disadvantage by applying such standards, and assuring coastal States not only the right to apply higher standards if they chose, but the right to seek technical assistance from the international authority in doing so.

VII. Preparations for the 1973 Law of the Sea Conference

In addition to calling for a law of the sea conference in 1973, the United

Nations General Assembly in December 1970 also called for two meetings of a preparatory committee to prepare for the conference in 1971, and two more meetings in 1972. In the fall of 1972, the General Assembly will decide on the precise date of the conference and could postpone it. Under the usual rules, a two-thirds majority will be required at the Conference for the adoption of a final treaty text.

During the meetings of the preparatory committee, more than 90 countries have indicated their general views. While the United States has not agreed with all the views expressed, the development and articulation of national positions is an important first step in effective multilateral negotiations. Moreover, the discussions to date indicate at least the broad parameters of a possible eventual agreement consisting of the following elements:

(a) A 12-mile Territorial Sea.

At the present time, of the 120 coastal states, 70 claim territorial seas of twelve miles or more (including twelve claiming more than twelve miles up to 200). This 12-mile figure would appear to be the only figure on which the possibility of general agreement exists and there has, in fact, been a growing consensus in support of a 12-mile territorial sea, assuming that certain other conditions are met at the same time.

Thus, on the one hand, United States willingness to accept a 12-mile territorial sea is conditioned on recognition of free transit through and over international straits overlapped by territorial seas. On the other hand, the willingness of many developing countries to accept a 12-mile territorial sea, is conditioned on their obtaining adequate control of the resources off their shore beyond twelve miles.

(b) Freedom of Navigation on the Surface, Submerged and in the Air Beyond Twelve Miles.

Countries which limit their territorial sea claims to twelve miles, of course, recognize freedom of navigation and overflight in the oceans beyond twelve miles.

Moreover, certain countries that claim 200 mile territorial seas such as Argentina and Uruguay, have expressly recognized navigational freedoms beyond twelve miles. Most other states claiming 200 miles have indicated their willingness to recognize such freedoms beyond twelve miles, as part of a general law of the sea settlement if their jurisdiction out to 200 miles over resources (and in some cases for other limited purposes) is recognized.

Freedom of navigation and overflight beyond twelve miles is, of course, vitally important to our naval mobility and operations, particularly that of our nuclear submarines and aircraft.

(c) Coastal State Economic Jurisdiction.

The vast majority of states have indicated a willingness to recognize some form of coastal state economic jurisdiction beyond twelve miles, as part of an overall law of the sea agreement. There remain significant differences as to the limits of coastal state economic jurisdiction as well as its content.

(d) International Legal Régime for the Seabed beyond Coastal State Economic Jurisdiction.

In December 1970, at the same time the 1973 law of the sea conference was called, the UN General Assembly adopted, with no negative votes, a Declaration of Principles for an international régime for the seabed beyond national jurisdiction. These principles are the basis for the preparation of treaty provisions on the international seabed régime to be agreed at the 1973 Law of the Sea Conference.

The Soviet Union and a number of Eastern European countries abstained from voting on this Declaration, principally because of their opposition to the principles relating to sharing of revenues from seabed mineral exploitation with the internation community and the establishment of an international organization with a role in administering the international régime for the seabed. However, in subsequent meetings of the preparatory committee, the Soviet Union has indicated that it is now prepared to accept, as part of a general package in which its navigational and other objectives are satisfied, some form of revenue sharing as well as international machinery.

The key unsettled issues on which the success or failure of the 1973 Conference will doubtless hinge are the following:

(1) How far beyond 12 miles should coastal state economic jurisdiction extend, and should it be exclusive or subject to international standards and accountability?

Many developing coastal states are urging the adoption of a 200-mile exclusive resource zone, in which the coastal state will have complete and exclusive jurisdiction over both the mineral resources of the seabed and fisheries. Other states have been urging narrower limits on the coastal state jurisdiction, particularly the distant water fishing states such as the Soviet

Union, United Kingdom and Japan, with respect to coastal state fishing jurisdiction, and the landlocked and shelf-locked countries with respect to coastal state jurisdiction over the seabeds' mineral resources.

The United States has been particularly concerned with protecting other uses such as navigation, overflight and freedom of scientific research in any area over which coastal state economic jurisdiction is recognized. In addition, for the reasons set forth earlier under "United States Policy-Fisheries," the United States has opposed subjecting highly migratory oceanic fish such as tuna, to coastal state jurisdiction and has proposed coastal state jurisdiction over salmon, from a coastal state's rivers throughout their migratory range on the high seas.

In general, the United States has urged that coastal states' interest in control over the resources off their coast, be reconciled with the international community's interest in other uses of the area, in which these resources are located; and that this objective can be achieved most effectively by the delegation to coastal states, of resource management jurisdiction subject to international standards, protecting other uses of the area and the marine environment.

Coastal states compliance with these international standards would be subject to compulsory dispute settlement. It has also been our view that revenues for the international community as a whole from seabed minerals, will not be very meaningful unless payments for this purpose are made, not only with respect to the deep seabed exploitation of the hard minerals contained in manganese nodules, but also, at least in some measure, with respect to the exploitation of the petroleum and gas resources of the continental margin beyond the 200 meter depth line.

(2) Free transit through and over international straits.

The United States' objective of achieving an international guarantee of free transit through and over straits used for international navigation has been supported by other maritime states, such as the United Kingdom, France, the USSR and a limited number of developing countries such as Argentina, Ethiopia and Singapore. On the other hand, it has been strongly opposed by Spain and a number of other straits states. The great majority of developing countries which are not straits states have taken no position on this issue.

The United States has stressed the fact that we are seeking a limited right solely for the purpose of transit of straits. This right would not permit a transiting vessel to engage in other activities while in transit, as it could on the high seas. We understand and will seek to accommodate the con-

cerns of coastal states with respect to navigational safety and pollution. However, these concerns should be accommodated through international arrangements, rather than giving the coastal state discretion, which could interfere with the substance of the right of free transit.

The United States has also stressed the desirability, in terms of avoiding international conflict, of preventing a situation in which coastal state discretionary control of transit, would in effect create a series of crisis points like the Berlin corridor throughout the world, in which straits' states would be subject to both international and domestic pressure with respect to the exercise of their discretion in permitting transit.

(3) Nature of international régime and machinery in the area beyond coastal state economic jurisdiction.

Among the key issues which the Declaration of Principles for the seabed beyond coastal state economic jurisdiction did not resolve, are the powers of the international agency established to administer the régime. A number of developing countries have suggested that the international agency should have concurrent or exclusive authority to engage directly in the exploitation of resources. The United States and a number of other developed countries have suggested that the international agency limit itself to licensing states or enterprises sponsored by states, inspecting and regulating their activities and collecting revenues for the international community.

The United States has indicated concern at the extent of the investment and bureaucracy that would be required if the international agency itself were to engage in deep-sea mining. The interest of developing countries in participating directly in exploitation and developing their technological capabilities, could be met through technical assistance from the international agency and participation in joint ventures.

A number of developing countries have also urged that the international agency have the authority to regulate prices and production. Dr. Vincent McKelvey, the Director of the United States Geological Survey, has indicated that, with the possible exception of cobalt, the projected increase in world demand is such that any significant adverse impact on the economy of land producers is highly improbable. In any event control of production and prices with respect to seabed mining would not achieve its objectives, unless there were also controls applied to existing and potential land-based production.

Almost all of the proposals for the international agency for the seabed contemplate the establishment of an agency, with significant rule-making

and regulatory authority with respect to the exploration and exploitation of seabed minerals.

They have agreed on an assembly in which all member states would participate and a smaller representative council which would exercise most of the rule-making and regulatory authority. However, a crucial issue is the composition of the council. The United States has indicated that to the extent that this council is given significant regulatory powers, the more industrially developed states, whose activities will be most affected, will require a voting structure that protects their interests, if the legislature and peoples of such countries are to be persuaded to agree to the international régime and machinery. A number of developing countries have indicated that, in their view, there can be no deviation from the one-vote-one-nation principle, although some are proposing different criteria for balanced membership and more that a simple majority for decision-making; the Soviet Union has proposed that decisions be reached by consensus.

Further discussion and negotiation with respect to these issues is required in order to develop a satisfactory accommodation.

(4) Coastal state pollution jurisdiction beyond twelve miles.

A number of coastal states have urged that pollution jurisdiction should accompany coastal state resource jurisdiction, in the area beyond a 12-mile territorial sea. This will doubtlessly continue to be an important area of discussion and negotiation.

In some areas there seems to be a large measure of agreement. Coastal state jurisdiction over marine pollution emanating from land is clear. Moreover, it seems generally understood that coastal state economic jurisdiction over seabed resources, including such jurisdiction in an intermediate zone, will include coastal state controls over pollution from exploration and exploitation of such resources. The issue is the extent to which such controls should be subject to international standards, inspection, and dispute settlement, including minimum standards promulgated by the international seabeds organization for this purpose.

There is difficulty in dealing with the question of pollution from vessels. On the one hand, the interest of coastal states in protection from such pollution is clear. On the other hand, the international interests in freedom of navigation could be seriously compromised by coastal state controls over vessels and their movements. Moreover, the fact that vessels by their very nature move over large distances, tends to raise serious practical questions regarding the effectiveness and harmonization of different coastal state measures.

At present, the Intergovernmental Maritime Consultative Organization is very active in the field of preventing pollution from vessels by agreed international arrangements, and has produced a number of Conventions on the subject. With respect to IMCO's future activities in this area, at least two problems must be addressed:

First, the role of IMCO in continuing to develop international standards, and the extent to which this role needs strengthening to protect the interests of coastal states.

Second, whether additional measures for international cooperation in enforcement are desirable, and the extent to which these should involve IMCO, coastal states, or both.

VIII. Prospects for 1973 Conference

While there may not be full preparation, it would be a serious mistake for the next General Assembly to postpone the Conference beyond 1973. Technical preparation is useful, but it is more important to the success of the Conference that governments begin to take the hard political decisions on which a consensus may be based. Delay would only increase the difficulty, particularly if unilateral claims proliferate. On the one hand, coastal states will become impatient to control their offshore resources, while on the other hand the development of deep sea mining capability by the more technologically advanced countries will be proceeding apace.

If the broad lines of a consensus begin to emerge this year, the technical preparation and resolution of procedural issues on the preparatory committee would be facilitated.

In carrying on these negotiations, the United States Government needs the counsel and support of the U.S. industries and other interests affected, including the general public. We have attempted to achieve this both through a formal broadly-based advisory committee and informally through discussion and conferences with many different groups.

There is hardly a time in history when the world was in greater need of general respect for international law and institutions. The present crisis in the law of the sea—the heart of international law as we have known it for almost three centuries—presents a serious threat. The law of the sea must be modernized by general international agreement, or it will give way to a partition of the oceans and contribute to a disintegration of international law generally. On the other hand, this crisis represents a challenge: If the international community could develop effectively functioning international law and institutions for the oceans, this could lead to greater reliance on such law and institutions generally.